No. 85-1658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF TEXAS CABLE TV ASSOCIATION, INC., ET AL. AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Regulated public utilities charge rent to cable television operators who attach cable television facilities to utility poles. May Congress empower an administrative agency, subject to judicial review, to control those rents?

2. Is the regulation of rates which utilities may charge for use of property already dedicated to public service a "taking" under the Constitution?

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BRIEF OF TEXAS CABLE TV ASSOCIATION, INC., ET AL. AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The Texas, Virginia, Georgia, and Missouri Cable Television Associations are trade associations representing cable television operators in their respective states. Continental Cablevision, Inc.; Daniels & Associates, Inc.; Times Mirror Cable Television, Inc.; TeleCable Corporation; Tele-Communications, Inc.; United Artists Cablesystems Corporation; and United Cable Television Corporation are cable television operators providing cable service throughout the nation. Together the amici represent cable systems serving more than 12 million subscribing households. The Associations and the operators are all parties to and/or vitally interested in proceedings presently pending before the Federal Communications Commission under the statute held unconstitutional by the Court below. All of the operators presently attach cable facilities to utility poles at rates which have been established with reference to the statutory guidelines.

The Eleventh Circuit has held, *sua sponte*, that Congress and its federal agencies are constitutionally forbidden to regulate the rates which public utilities charge for attaching cable television lines to utility poles. It held, based upon an 1893 case, that only courts may set such rates. The Eleventh Circuit's archaic ruling is inconsistent with current Supreme Court precedent; imperils the cable communications market; and repudiates the long-accepted principles under which Congress and its agencies regulate the modern economy.

The amici will be vitally affected by the outcome of this case. We urge this Court to review and reverse the Eleventh Circuit decision.[1]

STATEMENT OF THE CASE

The Public Interest In Pole Attachment Regulation

Until Congress passed the Pole Attachment Act in 1978, the progress of cable television faced an intractable, nationwide obstacle. Cable operators, seeking to serve television households without violating public and municipal antipathy to duplicative pole lines, sought to rent surplus space to string cable television facilities on existing utility poles.[2] They were faced with the predatory pricing of telephone companies hostile to the independent ownership of a competitive technology.[3] With the complicity of power companies, with whom the telephone companies owned or administered virtually all of the available poles, the telephone companies drained cable operators with unjustified pole rent increases.[4] Those poles had been

[1] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this Brief. Their letters of consent have been filed with the Clerk of the Court.

[2] "Use is made of existing poles rather than newly placed poles due to the reluctance of most communities based on environmental considerations, to allow an additional, duplicate set of poles to be placed." H. R. Rep. No. 721, 95th Cong., 1st Sess. 3 (1977).

[3] Section 214 Certificates, 21 F.C.C.2d 307, 316, *modified*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971).

[4] Manatee Cablevision, Inc., 22 F.C.C.2d 841, 849 (1970), *vacated as moot*, 35 F.C.C.2d 639 (1972); TeleCable Corp., 19

set in public rights-of-way, or in easements obtained with the backing of public law, to deliver public services. Congress found that utilities, who enjoyed their monopoly positions only through government intervention, were standing in the gateway of commerce, abusing their public trust and frustrating the public interest in the development of the communications marketplace.[5] Antitrust remedies, while they existed, were slow, expensive, and therefore ineffective.[6]

FCC Pole Attachment Rent Control

Congress remedied the wrongs of the utilities with the Pole Attachment Act.[7] It charged the Federal Communications Commission ("FCC") with the duty to set "just and reasonable" rates for attachment

F.C.C.2d 574, 578-79, 587 (1969); United Tel. Co. of Pennsylvania, 40 F.C.C.2d 359, 361 (1973); Radio Hanover, Inc. v. United Utils., Inc., 273 F. Supp. 709 (M.D. Pa. 1967).

[5] The Act's sponsor explained: "These utilities, however, have responded in traditional monopolistic fashion, offering cable operators 'take it or leave it' terms. Not only does this situation hamper the expansion of cable television service, but in at least one instance, it resulted in ongoing cable service being cut off to consumers. . . . [C]onsumers now receiving cable television as well as consumers who desire access to this service in the future will benefit from this bill's attempt to protect them from the abusive monopoly power of the utilities." 123 Cong. Rec. 16694 (1977) (statement of Rep. Wirth).

[6] After 11 years of litigation, Northwestern Bell Telephone's pole attachment pricing and practices were held to violate the Sherman Act, but by then the cable operator was out of business. TV Signal Co. of Aberdeen v. AT&T Co., 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D. March 13, 1981).

[7] 47 U.S.C.A. § 224 (West Supp. 1985).

space on poles, once the space is offered by utilities.[8] The rates are to be set within statutory guidelines which assure the utility of at least cost recovery, based on avoidable costs, and at most rates as they might be calculated by a public service commission, based on fully distributed costs.[9] In practice, the FCC has established pole attachment rates on fully distributed costs which assure utilities of a reasonable rate of return. Under standard utility accounting practice, regulated utilities are guaranteed non-confiscatory rates of return on their pole investments.[10] The FCC merely defines which costs of pole plant already dedicated to public service will be recovered from cable operators. All remaining costs are recovered from ratepayers.

The Commission also permits utilities a standard contractual requirement that the cable operator purchase taller replacement poles (and continue to pay rent) whenever the utilities need to use the attachment space rented to cable operators.[11] The utilities

[8] "Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable . . . as a result of private agreement . . . ." S. Rep. No. 580, 95th Cong., 1st Sess. 15 (1977).

[9] 47 U.S.C.A. § 224(d) (West Supp. 1985).

[10] Those public service commissions which account for rents from cable television operators treat them as reductions in a utility's revenue requirement. Regardless of the amount of pole rents collected, all public service commissions are required to set required revenues from ratepayers at levels which assure a nonconfiscatory return on regulated property.

[11] Cable Television Pole Attachment Rate Formula, 56 Rad. Reg. 2d (P&F) 707, 710 (1984).

are not only fully compensated for the space rented to cable, but are provided identical replacement space if their needs increase.

Under Commission regulation, cable operators and utilities may secure swift and expert resolution of pole disputes. Unlike judicial remedies, FCC procedures do not cost the parties or the public more to process than is at stake in most of the rent disputes. The FCC also offers consistent resolution of the rent disputes which may arise in any of the 18,500 franchise areas served by cable. Now that the Commission has developed consistent methods for rate setting, it has become commonplace in the cable and utilities industries to reach statewide settlements using the FCC rate methodology. For example, the rental rates for all Bell telephone poles rented to each Texas cable operator are routinely adjusted annually under the FCC formula, in consultation with the state cable television trade association, without the need for Commission involvement. The same is done for power poles rented to cable operators in Georgia. State authorities which regulate pole rentals also rely heavily on federal example. In California, the state pole rental statute imports key elements of the FCC formula, as does New York law.[12]

Judicial Control of FCC Rate Orders

The FCC's orders are enforced only through the Justice Department in federal district court.[13] FCC orders to which utilities or cable operators object may

[12] Cal. Pub. Util. Code § 767.5 (Deerings Supp. 1985); N.Y. Pub. Serv. Law § 119-a (McKinney 1986).

[13] 47 U.S.C.A. § 401(b) (West 1962).

be appealed directly from the FCC to the U.S. Courts of Appeal, which have already proven themselves capable of rigorous analysis of the FCC's methods of calculating just and reasonable rates.[14] Any constitutional deficiency in the compensation is also subject to Tucker Act review in the U.S. Claims Court.[15] By referring these pole rental disputes for expert agency resolution in the first instance, Congress has assured the swift removal of market impediments without clogging the already backlogged courts.

SUMMARY OF ARGUMENT

In holding Congress and its administrative agencies powerless to impose administrative price controls, the Eleventh Circuit has reverted to archaic principles. Agencies have long been permitted to regulate rates for use of property affected with a public interest, subject to judicial review. By removing such regulatory authority exclusively to the courts, the Eleventh Circuit has shifted economic regulation to the already burdened courts, and undermined the foundation of utility regulation and much of the New Deal.

Such judicial activism is not constitutionally compelled. In this case, Congress regulates the rates charged by utilities for pole attachments because the utilities had abused the monopoly power given them as a public trust. All of the affected utility property—its distribution plant and the entirety of each pole—

[14] 47 U.S.C.A. § 402(b) (West 1962); Alabama Power Co. v. FCC, 773 F.2d 362 (D.C. Cir. 1985).

[15] 28 U.S.C.A. § 1491 (West Supp. 1985); Thomas v. Union Carbide, 105 S. Ct. 3325 (1985); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

is already dedicated to public service, is included in the utility's rate base, and is guaranteed a nonconfiscatory return. The utilities are guaranteed perpetual use of the space rented to cable operators, under contracts which permit the utilities to recapture the space as needed. If, for some reason, this long-accepted scheme of rate regulation constitutes a "taking," Congress has assured just compensation. While the FCC sets the rates in the first instance, that compensation is subject to exacting judicial review and Tucker Act review for any constitutional deficiencies. The legality of comparable legislative action has been upheld by this Court, the D.C. Circuit, and the New York Court of Appeals. The Eleventh Circuit's contrary decision is an anachronism and must be reversed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Consequences of the Eleventh Circuit Decision

The Eleventh Circuit Court of Appeals has *sua sponte* held that it is constitutionally impermissible for Congress or an administrative agency to regulate pole rents.[16] The Circuit Court drew on this Court's holding in *Loretto*, which found a "taking" when a state permitted a cable operator to lay cable permanently on the property of an unwilling landlord.[17] From that narrow building, the Eleventh Circuit found a "taking" in Congress' regulation of the attachment rates

[16] Florida Power Corp. v. FCC, 772 F.2d 1537, 1545 (11th Cir. 1985).

[17] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

which heavily regulated public utilities, guaranteed a rate of return, may charge to cable television operators. Then, principally in reliance upon an 1893 case which has been repudiated by Justice Holmes and by a majority of the present Court,[18] the Eleventh Circuit held that only a court could set the compensation due the utilities.[19]

The Eleventh Circuit has made the narrow holding of *Loretto* swallow one hundred years of economic regulation. This Court has long upheld the legislature's right to subordinate property rights to the public interest in administrative price controls.[20] If agencies were powerless to set rates wherever physical occupation is deemed to occur, then the already backlogged courts would be swamped with compensation claims whenever a railroad hauls freight; or a public service commission orders power companies to interconnect facilities; or the FCC orders communications carriers to interconnect; or a legislature establishes rent control. All of these involve physical occupation of property, be it utility property or private property affected with a public interest. Yet they have all been upheld as legitimate forms of economic regulation,[21] now made suspect by the decision on appeal.

The Court's ruling will frustrate any Congressional regulation in the public interest wherever physical occupation is deemed to occur. Under the Eleventh Circuit's view, taking will become the new substantive due process, the new non-delegation doctrine—activist doctrines widely reported to be "dead in the federal courts."[22] It would shift the burden of economic regulation from Congress and its agencies to the judiciary, at a time when this Court and this Administration has called on Congress to relieve federal judges of the growing "judicial deficit" of backlogged cases.[23] Such a rebirth of "economic civil rights" has been recommended by some academics; but even they admit that the view is a radical departure from modern jurisprudence, which would re-

[18] The Circuit Court relied on Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), the case which was relied upon by the losing parties in the rent control case and the rail reorganization case. Brief for Defendant in error at 29, Block v. Hirsh, 256 U.S. 135 (1921) (rejected by Court at 157, relying upon Munn); Brief for Appellee, Penn Central Co. at 54, 58, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) (rejected by Justices Brennan, Blackmun, Burger, Marshall, Powell, Rehnquist, and White at 149, relying on Tucker Act).

[19] 772 F.2d at 1545.

[20] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 395-400 (1940) (coal prices); Nebbia v. New York, 291 U.S. 502 (1934) (milk prices).

[21] In Gainesville Utils. Dept. v. FPC, 402 U.S. 515, 528 (1971), for example, the Court held that the FPC may order physical interconnection of power companies and that Congress may "commit judgment of what compensation is reasonably due, in this highly technical field, to the Commission." The same holding applies to communications carriers. Bell Tel. Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[22] 1 Davis, Administrative Law Treatise § 3.10, at 187 (2d ed. 1978).

[23] *See, e.g.*, Chief Justice Burger, 1985 Year-End Report on the Judiciary 3-4; J. Rose and D. Karp (Department of Justice), *Congress' Inaction to Blame for Federal Court Backlog*, Legal Times, January 23, 1984 at 14, col. 1 (encouraging greater reliance on agencies to resolve disputes with "some degree of Article III review").

peal the New Deal; and even they would not extend their activism to dismantle utility regulation.[24]

Constitutionality of Administrative Rate Regulation

The Eleventh Circuit's emasculation of Congressional power is nowhere compelled by the Constitution. The constitutionality of Congress' use of remedial rent control has long been upheld. Justice Holmes, for example, upheld state and federal rent and eviction control. "If the public interest be established," he wrote, "the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn* v. *Illinois*, 94 U.S. 113, 24 L Ed. 77." *Block* v. *Hirsh*, 256 U.S. 135, 257 (1921). On that cornerstone, the structure of modern economic regulation has been built.

Utilities have developed and enjoyed monopoly control of poles and rights-of-way solely because of government intervention. Utilities were granted the powers of eminent domain as a public use and assured the privilege of protected markets as a public trust. Congress is fully empowered, if not obligated, to prevent the utilities' abuse of that governmentally-created market power and to protect the communications marketplace. As the Court noted this Term in upholding a rent control ordinance, "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims . . . ."[25] Faced with the public need for swift control

[24] R. Epstein, Takings: Private Property and the Power of Eminent Domain 274, 281 (1985).

[25] Fisher v. City of Berkeley, 106 S. Ct. 1045, 1048 (1986).

of predatory rate increases by monopoly public utilities, Congress charged the FCC with controlling pole attachment rates. We do not believe that Congress' scheme of pole attachment regulation is a "taking," anymore than is rent control, or was the control of rates charged for grain elevator space in *Munn*. This is particularly so because (1) the utilities are renting poles which are *already* dedicated to public service and embedded in the rate base, and are therefore guaranteed their authorized rates of return;[26] and (2) the utilities are never permanently displaced from use of the pole space rented to cable operators.[27]

But if some regulatory line has been crossed, and the Pole Attachment Act constitutes a "taking," there is nothing in modern law incapacitating Congress from using agencies in the first instance to set compensation, where the amount may be tested under the Tucker Act and in judicial review. In upholding the Rail Reorganization Act of 1973, for example, this Court made clear that Congress could not only take title to the properties of northeast corridor railroads, but could specify the form of compensation, and could establish an independent agency to set its amount.[28]

[26] Fifth Amendment takings claims by utilities have long been rejected where regulated rates are set at just and reasonable levels. FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944). The regulation of utility rates assures a nonconfiscatory return. *See* note 10.

[27] *Loretto* found a taking only where cable had been granted "permanent physical occupation" of property, to the exclusion of its owner. 458 U.S. at 435-36. Utilities are guaranteed the right to recover the space rented to cable if their own needs increase. *See* note 11.

[28] 419 U.S. at 149-54.

The Court rejected the railroads' constitutional demands for a court trial, holding that the Tucker Act remedy alone cured any constitutional question which might arise in the administrative proceedings.

The legality of comparable procedures in cable regulation has been assumed by respected courts. On remand from *Loretto*, the New York Court of Appeals upheld state procedures permitting administrative determination of just compensation, subject to judicial review.[29] The U.S. Court of Appeals for the District of Columbia Circuit has assumed that if the Pole Attachment Act constituted a taking, then the Commission's scheme of rate setting assures just compensation.[30] The Eleventh Circuit's ruling to the contrary is archaic.

CONCLUSION

The need for the Supreme Court to address the Eleventh Circuit's anomalous ruling can hardly be overstated. Congress has every right to protect the communications marketplace from the overreaching of regulated monopolists. Unless the Eleventh Circuit is reversed, Congress will be unable to regulate the modern economy without initiating district court action each time regulations are applied.

For these reasons, this Court should note probable jurisdiction and reverse the judgment below.

[29] Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 153, 446 N.E.2d 428, 434, 459 N.Y.S.2d 743, 749 (1983).

[30] Alabama Power Co. v. FCC, 773 F.2d at 367 n.8.

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April 9, 1986

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Brief of Texas Cable TV Association, Inc., et al., as Amici Curiae" were properly mailed, postage prepaid, this 9th day of April, 1986, to the following:

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